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## Protest Decision

**Matter of:** Performance Automotive Group, Inc.

**Case No.:** 2019-118

**Posting Date:** November 13, 2018

**Contracting Entity:** State Fiscal Accountability Authority

**Solicitation No.:** 5400016231

**Description:** Statewide Contract for Law Enforcement Vehicles

### DIGEST

Protest alleging that the low bidder is not responsible is denied. A protest that the third lowest bid was made the second low bid after opening is dismissed as moot. Performance Automotive Group's (PA) protest is included by reference. [Attachment 1]

### AUTHORITY

The Chief Procurement Officer<sup>1</sup> (CPO) conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on materials in the procurement file and applicable law and precedents.

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<sup>1</sup> The Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

## **BACKGROUND**

The State Fiscal Accountability Authority (SFAA) issued this Invitation for Bids for law enforcement vehicles on August 24, 2018. The solicitation was amended on September 21, 2018. The solicitation had six line items and award was to be made by item. Four bids were received on October 9, 2018. Santee was the lowest bidder for item 4. Butler Chrysler Dodge Jeep was the second lowest bidder, PA was the third lowest bidder, and Horace G. Ilderton, LLC dba Ilderton Dodge Chrysler Jeep Ram was the highest bidder.

Santee Automotive, LLC was awarded item 4 on October 19, 2018. PA protested the award of item 4 alleging that the low bidder Santee was a non-responsible bidder and the second low bidder Butler's bid was improperly modified after bid submission resulting in its third lowest bid becoming the second lowest bid.

## **ANALYSIS**

PA alleges that Santee was a non-responsible bidder based on its performance of a previous contract for vans. A responsible bidder is defined in Section 11-35-1410(6) as:

"Responsible bidder or offeror" means a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.

Section 11-35-1810 requires the procurement officer to make a determination of responsibility for each contract awarded:

Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts. The board shall by regulation establish standards of responsibility that shall be enforced in all state contracts.

Regulation 19-445.2125(A) set forth the factors to be considered in determining the responsibility of a bidder:

Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has:

- (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (2) a satisfactory record of performance;
- (3) a satisfactory record of integrity;
- (4) qualified legally to contract with the State; and
- (5) supplied all necessary information in connection with the inquiry concerning responsibility.

The issue raised by PA involved a contract for vans awarded to Santee that required bucket seats in the second row of seating, and Santee delivered a number of vehicles with bench seats instead. In its letter of protest, PA acknowledges that Mr. Dawson, the procurement officer for the van contract, was aware of and had addressed Santee's performance issues to the satisfaction of the State.

A determination of responsibility by the procurement officer that the low bidder has the capacity to meet the terms of the contracts is based only in part on the company's record of past performance. Other considerations are set out in the Regulations. In this case, the procurement officer determined Santee to be a responsible bidder and, unless that determination is clearly erroneous, arbitrary, capricious or contrary to law, the CPO will not substitute his judgement for that of the procurement officer. In its letter of protest PA acknowledges that the issue with the bucket seats was resolved to the satisfaction of the State. The contract was not cancelled nor did either party seek resolution of a controversy by the CPO. Santee currently holds eleven contracts with the State without any known issues. The buyer's determination that Santee is a responsible bidder is not clearly erroneous, arbitrary, capricious, or contract to law. PA's protest that Santee was a non-responsible bidder is denied.

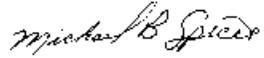
Since Santee was the lowest responsive and responsible bidder, PA's protest of Butler's bid is dismissed as moot.

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Case No. 2019-118  
November 13, 2018

**DECISION**

For the reasons stated above, the protest of Performance Automotive Group, Inc. is denied.

For the Materials Management Office



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Michael B. Spicer  
Chief Procurement Officer



October 27, 2018

Chief Procurement Officer  
Materials Management Office  
1201 Main Street  
Suite 600  
Columbia, South Carolina 29201

RE: Solicitation 5400016231 Protest of Intent to Award

Gentlemen,

Please accept this correspondence as Performance Automotive Group, Inc.'s (hereafter "Performance CDJR") protest of the Intent to Award Item #4: LE-4 Sedan, Intermediate, RWD to Santee Automotive, LLC (hereafter "Santee"), of Solicitation Number 5400016231, Statewide term contract for Law Enforcement Vehicles. Please note that because of post submittal bid form modifications, this protest is submitted with two distinct parts and should be reviewed accordingly. The Intent to Award is included as **Appendix 1**.

**Part I – Protest of Intent to Award LE-4: Sedan, Intermediate, RWD to Santee Automotive, LLC.**

Page 27 of the aforementioned solicitation (**Appendix 2**) outlines the criteria for award as follows:

**VI. AWARD CRITERIA**

**AWARD BY ITEM (JAN 2006)**

Award will be made by individual item. [06-6005-1]

**AWARD CRITERIA – BIDS (JAN 2006)**

Award will be made to the lowest responsible and responsive bidder(s). [06-6020-1]

The definition of a "Responsible Bidder" is provided by the South Carolina Consolidated Procurement Code (19-445), (**Appendix 3**) under section 19-445.2125 as below:

19-445.2125. Responsibility of Bidders and Offerors.

A. State Standards of Responsibility.

Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has:

- (1) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;
- (2) a satisfactory record of performance;
- (3) a satisfactory record of integrity;
- (4) qualified legally to contract with the State; and
- (5) supplied all necessary information in connection with the inquiry concerning responsibility.

Performance CDJR contends that Santee does not meet the definition of a responsible bidder as outlined above based on their unsatisfactory record of performance regarding the currently active contract 4400017373, Statewide Term Contract for Vans, Van 2 – Mini, 7/8 Passenger Flex Fuel (**Appendix 4-1**). We acknowledge that Santee was awarded this specification for the term 11/17/2017 to 10/31/2018. We further acknowledge that Performance CDJR was awarded Van 3, Contract 4400017371 for the same term (**Appendix 4-2**). Although Van 2 and Van 3 have different specification numbers, they are identical vehicles as shipped from the factory.

We offer the following as support for this position:

- While delivering contract vehicles to the South Carolina State Lot, Performance CDJR observed many Dodge Grand Caravans, some with license plates, and some without, staged for delivery that did not have the seating arrangement as required by the minimum standards of Solicitation 5400013668 for Van 2. The minimum specifications require 2<sup>nd</sup> row bucket seats, and the vehicles as delivered had 2<sup>nd</sup> row bench seating. (**Appendix 4-3**)
- On April 23, 2018, Performance CDJR sent the contact administrator, Nathan Dawson, an email (**Appendix 4-4**) clearly outlining the deficiency. The specified 2<sup>nd</sup> row bucket seat configuration required the addition of factory option Code CYC, that had a wholesale price for 2017 models of \$886, and for 2018 models, \$1,064. Delivery of vehicles ordered without this required option would create substantial financial benefits for Santee, and at the same time, would not meet the minimum specifications as required by the contract.
- Performance CDJR sent Mr. Dawson another email on May 31, 2018 requesting clarification of this matter (**Appendix 4-5**). Since the contract specifications did not include a provision for delivering vehicles in this configuration, Performance CDJR reasoned that the State must have

received a discount for the deficiency as they had accepted and put similar vehicles in service. Providing a non contracted discount would have put Performance CDJR at a competitive disadvantage with regards to Van 3. Performance CDJR requested the discount amount that was taken for these vehicles so that Performance CDJR could offer the same configuration and recover competitiveness.

- With no response again, Performance CDJR sent an email to Mr. Michael Speakmon on July 2, 2018 regarding the aforementioned scenario. **(Appendix 4-6)**
- On July 3, 2018, Performance CDJR received an email from Mr. Dawson that confirmed Santee had indeed delivered vehicles that did not meet the minimum specification as required by the contract, and although he mentioned that financial restitution had been made by Santee, no confirmation was provided. **(Appendix 4-7)** Please note that there is no provision for the State to accept vehicles that do not meet the minimum specifications regardless of remuneration.
- On October 22, 2018, Performance CDJR reached out to Sonja Corely-Brown at the Materials Management Office to request a copy of sales reports that would show the agencies, State and Non State, that had acquired vans utilizing Contract 4400017373. Ms. Corley-Brown's colleague would not provide the information requested. **(Appendix 4-8)**

Based on the items outlined above, the State Procurement office has confirmed that Santee did in fact deliver vehicles to the State of South Carolina that did not meet the minimum contract specifications. Furthermore, Santee did collect the full contract amount for these vehicles and although Mr. Dawson stated that remunerations were made to the State of South Carolina, he did not address purchases made by non state agencies, and Performance CDJR was unable to obtain this information from the Materials Management Office. Non state agencies often utilize the statewide vehicle procurement contract for their own procurement requirements, and as a fiduciary of these agencies, the State should confirm that all of these agencies were provided financial compensation if they paid for vehicles that did not meet the minimum required specifications. Failure to properly compensate these agencies after the deficiency was known would be a much more serious issue.

Even if compensation was made to the end users of these vehicles, nothing changes the fact that Santee delivered and charged for vehicles that did not meet the minimum requirements. At the very least, this constitutes a failure to implement an adequate quality control plan and exposes a lack of oversight over their bidding and delivery processes. Based on the criteria set forth by the State Of South Carolina in the Consolidated Procurement Code, and the lack of institutional controls exhibited by Santee during execution of their current Van 2 award, Performance CDJR contends that Santee does not meet the definition of a responsible bidder and their bid should be

excluded from the Intent to Award for Solicitation 5400016231, Item #4: LE-4 Sedan, Intermediate, RWD.

## **PART 2 – Modification of Bid Documents After Submission**

On October 22, 2018, Pursuant to the Terms and Conditions document for Solicitation 540006231, Page 10, paragraph entitled "Submitting Confidential Information (Feb 2015), Performance CDJR submitted a request to the South Carolina Office of State Procurement in order to obtain a copy of the bid documents submitted for said solicitation, Item 4: LE-4 Sedan, Intermediate, RWD.

Performance CDJR received the requested documents on October 23, 2018. (**Appendix 5**). Prior to review of these documents, based on the bid opening, Performance CDJR had the second lowest evaluated price for LE-4.

### **Bid Opening Tabulations:**

#### **LE-4: Sedan, Intermediate, RWD**

<b>LE-4 Bid Opening Tabulation</b>	
<b>Bidder</b>	<b>Evaluated Price</b>
Santee	\$ 23,695.00
Performance	\$ 23,743.25
Butler	\$ 24,112.00
Ilderton	\$ 24,319.00

However, after further review of the bid documents received, Performance CDJR had the third lowest evaluated price.

<b>LE-4 After Modification</b>	
<b>Bidder</b>	<b>Evaluated Price</b>
Santee	\$ 23,695.00
Butler	\$ 23,721.75
Performance	\$ 23,743.25
Ilderton	\$ 24,319.00

Upon further review of the bid documents provided, we see that the State Procurement Office has modified the bid document that was submitted by Butler Chrysler, causing their evaluated price to lower. See below:

NOTE: If Add is included in the base price enter \$0.00 in the BLUE cell below and indicate "standard" in the GREEN cell. Use the GREEN cell below also to indicate whether an Add or Deduct requires an additional Add or Deduct. Be Specific.		
Additions	Add-on Amount	Add Comments
All Wheel Drive (indicate if engine change is required)	\$1,355.00	ADD: ENGINE UPGRADE 5.7L
Ballistic Panels	\$1,560.00	
Bluetooth/Hands Free Calling	\$0.00	STANDARD
Center Console Upgrade from Police Interior Package	\$230.00	
Engine Upgrade (indicate build & liters)	\$930.00	VB, 5.7L HEMI

**Malpass, Rob:**  
 Procurement Officer changed this amount to \$1,560.00 which represents the price per door/side. The Offerer submitted a price of \$3,120.00 and per Offerer this price represents the price for both doors/sides. In order to accurately evaluate and compare offers the price per door/side is needed.

Butler Chrysler signed and submitted a bid document that included pricing for Ballistic Panels of \$3,120.00. The yellow highlighted note above the addition cells clearly directs bidders to "Be Specific" with regards to explaining their option pricing. Butler chose not to include any details regarding submitted pricing for Ballistic Panels while each of the other three bidders chose to provide clarifications in this cell. On October 15, 2018, the Procurement Office reached out to Performance CDJR to clarify our bid submission regarding these ballistic panels. Response to this request is provided in **Appendix 6**, and clearly shows that the Ballistic Panels provided by Performance CDJR are Chrysler factory options, as required by specification, not aftermarket additions.

A contracting officer has every right to seek clarification from bidders regarding items submitted, however, modifying a duly signed and submitted bid document, in a manner that improves the bidder's standing in the bid results, is seemingly unprecedented. A bid must stand on the four corners of the submitted document. Modifications after submission are extremely rare, and governed by strict guidelines in order to maximize transparency. The South Carolina Consolidated Procurement Code addresses submitted bid modifications in section 19-445.2085. See Below:

19-445.2085. Correction or Withdrawal of Bids; Cancellation of Awards.

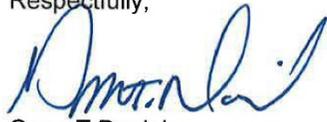
A. General Procedure.

A bidder or offeror must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder's or offeror's mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency, or the designee of either.

The first caveat of this subsection is that an error or mistake must have occurred. Butler submitted a cost number for Ballistic Panels and did not clarify any intrinsic features or quantities. We contend that no error occurred and that the bid was submitted in good faith and should stand as submitted. The second caveat of this clause is that said mistake will cause substantial losses. The price for Ballistic Panels

submitted by Butler has not been shown to cause substantial losses, therefore, Performance CDJR protests the Procurement Office's modification of Butler's signed and submitted bid document and in order to provide clarity and transparency of the bid process, requests that the bid document be evaluated as submitted.

Respectfully,



Gene T Daniel  
Government Sales Manager  
Performance Automotive Group, Inc.  
dba Performance Chrysler Dodge Jeep Ram  
605 Warsaw Road  
Clinton, North Carolina 28328

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

*Protest Appeal Notice (Revised June 2018)*

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

**FILE BY CLOSE OF BUSINESS:** Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

**FILING FEE:** Pursuant to Proviso 111.1 of the 2018 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. [The Request for Filing Fee Waiver form is attached to this Decision.] If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel  
Request for Filing Fee Waiver  
1205 Pendleton Street, Suite 367, Columbia, SC 29201**

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\_\_\_\_\_  
Name of Requestor

\_\_\_\_\_  
Address

\_\_\_\_\_  
City

\_\_\_\_\_  
State

\_\_\_\_\_  
Zip

\_\_\_\_\_  
Business Phone

- 
1. What is your/your company's monthly income? \_\_\_\_\_
  2. What are your/your company's monthly expenses? \_\_\_\_\_
  3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this  
\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

\_\_\_\_\_  
Notary Public of South Carolina

\_\_\_\_\_  
Requestor/Appellant

My Commission expires: \_\_\_\_\_

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For official use only: \_\_\_\_\_ Fee Waived      \_\_\_\_\_ Waiver Denied

\_\_\_\_\_  
Chairman or Vice Chairman, SC Procurement Review Panel

This \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_  
Columbia, South Carolina

**NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.**